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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFERY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF VIRGINIA RIGHT TO LIFE, INC. AMICUS CURIAE

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BRIEF OF VIRGINIA RIGHT TO LIFE, INC. AMICUS CURIAE[1]

INTRODUCTION

Virginia Right To Life, Inc., hereinafter referred to as (VRTL), is a non-stock, non-profit, non-sectarian,

[1] Letters of Consent, from the Attorney General For The Commonwealth of Virginia, Attorney for Appellee and from American Civil Liberties Union Foundation attorney for Appellant, to the filing of this brief have been filed with the Clerk. We address our remarks in this Brief to the Question Presented in the Brief of the Appellant.

Virginia Corporation organized for educational purposes. Membership is open to all Virginians.

The Corporation's primary purpose is to educate the public on the value and dignity of the *corporeal*[2] human body, which commences biological life from the moment of conception and continues to the final brain activity, an unbroken "Life Line" from the "Womb to the Tomb."

VRTL is unequivocally opposed to the destruction of one human life for the social convenience of another, no matter at what point of time in the womb to tomb life line, and no matter how pressing that social problem may appear to be.

A decision and rule of law[3] by this Court upholding the Court below is required to protect the people of Virginia and at least eighteen other states,[4] from commercial practices of laymen selling medical abortion services without regulation or license by state authority.

It is believed this Court will take notice of the operation of abortion referral agencies in the District of

[2] A term descriptive of such things as have an objective material existence; perceptible by the senses of sight and touch, possessing a real body. Opposed to incorporeal and spiritual. *Sullivan v. Richardson*, 33 Fla. 1, 14 So. 692.

[3] The word may mean or embrace * * * general rule of human action, taking cognizance only of external acts (physical or corporeal; as distinguished from mental or moral), enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society. *Holl. Jur.* 36; *Provident Life and Accident Ins. Co. v. Campbell*, 18 Tenn. App. 452, 79 S.W.2d, 292, 296.

[4] See ennumeration of states with similar or comparable laws, page 6 infra.

Columbia which advertise their services daily in a Northern Virginia community newspaper.[5]

STATEMENT OF THE CASE

Jeffery C. Bigelow was tried by the local court, sitting without a jury, and convicted of encouraging or prompting the procuring of abortion by publication, advertisement, sale, or circulation of the Virginia Weekly, a newspaper published in Charlottesville, in violation of Code 18.1-63. He was fined $500, $350 of which was suspended upon condition that he not further violate 18.1-63.

The case was appealed to the Virginia Supreme Court upon a stipulation of fact and certain exhibits. Bigelow had direct responsibility for the publication and circulation in Albemarle County of the February 8, 1972 issue of the *Virginia Weekly*. The issue contained the following advertisement:

[5] Northern Virginia Sun.

UNWANTED PREGNANCY
LET US HELP YOU

Abortions are now legal in New York
There are no residency requirements

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS
AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

On September 1, 1972, the Supreme Court of Virginia 213 Va. 191, 191 S.E.2d 173 upheld the constitutionality of Sec. 18-1-63 and its applicability to the above advertisement.

ARGUMENT

A. A Commercial advertisement such as the one involved here has no protection under the First Amendment.

Unless the advertisement can be divided into the commercial and non-commercial portion, the rule that a commercial ad is not within the Amendment is clear. The Court below rightly held that the subject matter and the ad were patently commercial and involved the

medical health field, a field clearly within the area of State regulation. See *Valentine v. Christensen*, 316 U.S. 52, 54.

B. Virginia Code Section 18-1-63 is not overbroad.

The ad supra is patently commercial on its face. It clearly is an offer in the medical health field to act as a broker for abortion services and gives a contact telephone number through which an acceptance of the offer may be made. Whether the client responding to the advertisement or the facility providing the medical services pays the "fee," "kickback," or "donation" to the referral agent does not diminish the agent's role of broker. As such it does not offend the First and Fourteenth Amendments as the Court below rightly held. *Beard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 94 L.Ed. 1233.

C. Code Section 18-1-63 is a reasonable measure designed to control the exploitation and sale of unlicensed medical services.

The law was applied to an underground newspaper operating out of an address in the city where the State University is located. Most Freshmen at the University at the time were eighteen and some were minors.

The Virginia law is worded much the same as similar

laws in at least eighteen other states,[6] and as such appears to be a reasonable exercise of legislative power. The Court below rightly upheld its Constitutionality.

D. The meaning of the word "abortion" as used in Section 18-1-63 should be determined under local law.

The Virginia abortion statute immediately precedes Section 18-1-63. The two sections are interrelated and the word "abortion" would appear to have the same meaning in *both* sections.

The meaning of the term must be reached with the use of our new knowledge.

As stated, supra page 2, the Womb to Tomb Life Line is now universally accepted. It defies former explanations or theories. It has dissolved the old doctrines of ancient philosophers, theologians, medical theorists and moralists. It is explained by:

> Dr. A.W. Liley, research professor in fetal physiology at National Women's Hospital, Auckland, New Zealand, a man renowned throughout the world as one of the principal founders and masters of the relatively new field of fetology. Dr. Liley writes:
>
> "In a world in which adults control power and purse, the fetus is at a disadvantage being small, naked, nameless and voiceless. He has no one except sympathetic adults to speak up for him and

[6] Arizona, Arkansas, Colorado, Hawaii, Illinois, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Jersey, Nevada, Kentucky, Ohio, Pennsylvania, Vermont, Wisconsin.

defend him—and equally no one except callous adults to condemn and attack him. Mr. Peter Stanley of Langham Street Clinic, Britain's largest and busiest private abortorium with nearly 7,000 abortions per year, can assure us the 'under 28 weeks the fetus is so much garbage—there is no such thing as a living fetus' Dr. Bernard Nathanson, a prominent New York abortionist, can complain that it is difficult to get nurses to aid in abortions beyond the twelfth week because the nurses and often the doctors emotionally assume that a large fetus is more human than a small one. But when Stanley and Nathanson profit handsomely from abortion we can question their detachment because what is good for a doctor's pocket may not be best for mother or baby.

Biologically, at no stage can we subscribe to the view that the fetus is a mere appendage of the mother. Genetically, mother and baby are *separate individuals* from conception. Physiologically, we must accept that the conceptus is, in very large measure, in charge of the pregnancy, *in command* of his own environment and *destiny* with a tenacious *purpose*.

It is the early embryo who stops mother's periods and proceeds to induce all manner of changes in maternal physiology to make his mother a suitable host for him. Although women speak of their waters breaking or their membranes rupturing, these structures belong to the fetus and he regulates his own amniotic fluid volume. It is the fetus who is responsible for the immunological success of pregnancy—the dazzling achievement by which fetus and mother, although immunological foreigners, tolerate each other in

parabiosis for nine months. And finally it is the fetus, not the mother, who decides when labour should be initiated.

One hour after the sperm has penetrated the ovum, the nuclei of the two cells have fused and the genetic instructions from one parent have met the complementary instructions from the other parent to establish the whole design, the inheritance of a new person.

The one cell divides into two, the two into four and so on while over a span of 7 or 8 days this ball of cells traverses the Fallopian tube to reach the uterus.

On reaching the uterus, this young individual implants in the spongy lining and with a display of physiological power supresses his mother's menstrual period.

This is his home for the next 270 days and to make it habitable the embryo develops a placenta and a protective capsule of fluid for himself.

By 25 days the developing *heart starts* beating, the first strokes of a pump that will make 3,000 million beats in a lifetime.

By 30 *days* and just 2 weeks past mother's first missed period, the baby, ¼ inch long, has a brain of *unmistakable human proportions*, eyes, ears, mouth, kidneys, liver and umbilical cord and a heart pumping blood he has made himself.

By 45 days, about the time of mother's second missed period, the baby's *skeleton is complete*, in cartilage not bone, the buds of the milk teeth appear and he makes his first movements of his limbs and body–although it will be another 12 weeks before mother notices movements.

By 63 days he will grasp an object placed in his palm and can make a fist." Cong. Rec., Vol. 119, May 31, 1973, No. 82 re S.J. RES. 119.

A new day of knowledge has emerged.

And this generation of Americans must fulfill their duty and act upon this new knowledge in order to fulfill their Constitutional duty to Posterity.[7]

The new duty is to recognize as "persons" corporeal human beings from the moment and hour of their conception and continually to the natural and final demonstrable human brain activity of that human being.

Under this formula and definition of abortion, the advertisement would clearly fall within the statute and the Court below rightly upheld the conviction.

Alternatively the Tenth Amendment precludes this appeal since the Supreme Court is without jurisdiction and the judgment below must stand.

There is no provision in the Federal Constitution which gives the Supreme Court jurisdiction over a local issue.[8] A case must be made out under some particular provision of the Constitution. Here the Appellant claims his is under the First Amendment.

But as we have previously pointed out, the advertisement was clearly commercial advertising and under decisions of this Court the First Amendment has not been offended. *Valentine v. Christensen*, 316 U.S. 52, 54.

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[7]Preamble U.S. Constitution: * * * and secure the blessings of liberty to ourselves and our posterity. * * *

[8]Practice of law: Emmons v. Schmitt, D.C. Mich. 58 F. Supp. 869, A # 149 F.2d 869 cert den. 66 S. Ct. 59, 326 U.S. 746 Practice of Medicine: Ghadiali v. Delaware State Medical Soc. D.C. Delaware, 48 F. Supp. 789.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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